IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 21, 2007

STATE OF TENNESSEE v. CHARLES R. CLEVENGER

Direct Appeal from the Criminal Court for Knox County
No. 75583 Mary Beth Leibowitz, Judge

No. E2006-02164-CCA-R3-CD - Filed January 16, 2008

Following a jury trial, Defendant, Charles R. Clevenger, was found guilty of aggravated robbery, a Class B felony. After a sentencing hearing, Defendant was sentenced as a Range II, multiple offender, to eighteen years. On appeal, Defendant argues that the trial court erred in determining the length of Defendant's sentence by not considering certain mitigating factors. After a thorough review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and ROBERT W. WEDEMEYER, joined.

Jason Baril, Knoxville, Tennessee, (on appeal); and Richard Gaines, Knoxville, Tennessee, (at trial), for the appellant, Charles R. Clevenger.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Leslie Nassios, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

At the time of the incident, Jerry Phillip DeBuhr, Jr., was the staff pharmacist at a Walgreen's drug store located on Clinton Highway in Knoxville. On June 29, 2002, at approximately 8:00 p.m., a man, later identified as Defendant, approached the counter. Mr. DeBuhr testified that he walked over to assist Defendant and observed Defendant pull out a device which Mr. DeBuhr described as "two sticks of something with a timer on it." Defendant also carried a pillow case. Defendant said, "This is an armed robbery," and placed the device on the counter. Mr. DeBuhr realized that the two sticks resembled dynamite in size and shape. Defendant turned the knob on the device and told Mr. DeBuhr he had one minute. Defendant told Mr. DeBuhr to put all of the "C2's," which are Schedule

II narcotic drugs, into the pillowcase. Mr. DeBuhr testified that the Schedule II drugs were kept in a locked location out of the public's view.

Mr. DeBuhr said he felt trapped by the presence of what he thought was dynamite, and he agreed to cooperate. Mr. DeBuhr took the pillowcase and walked to the back of the pharmacy. He opened four cabinets and then told Defendant to come around the counter and take the drugs he wanted. Defendant walked toward the opened cabinets as Mr. DeBuhr led Shannon Toland, the pharmacy's technician, and two customers to the front of the store. Ila Turner, an employee in the drug store's photography section, dialed 911 and handed the telephone to Mr. DeBuhr. The 911 operator asked Mr. DeBuhr to describe the perpetrator. At that point, Defendant walked down the aisle toward the store's front entrance, carrying the pillowcase. Mr. DeBuhr described Defendant as under six feet tall, with dark hair, and wearing a striped ball cap and a heavy, plaid shirt.

Mr. DeBuhr said that the Schedule II drugs in Defendant's pillowcase were later recovered. Defendant took only morphine valued at approximately $8,000. Mr. DeBuhr and Ms. Toland identified Defendant as the perpetrator from a photographic lineup.

Ila Turner testified that she noticed a man enter the drug store with a pillowcase and walk toward the pharmacy. In a few minutes, Mr. DeBuhr ran up and told her that they were being robbed and instructed her to call 911. Ms. Turner did so and handed the telephone to Mr. DeBuhr. After Defendant left the drug store, Ms. Turner went outside. Someone called out the license tag number of Defendant's maroon Lincoln Continental, and Ms. Turner wrote the number in the palm of her hand. At the preliminary hearing and at trial, Ms. Turner identified Defendant as the perpetrator.

Harold Roberts testified that he was waiting for a prescription at the drive through window when he saw a man on the employee side of the counter carrying a pillowcase. The man jumped over the counter, and Mr. Roberts said he knew that the pharmacy had just been robbed. Mr. Roberts drove his truck around to the front of the store. Defendant exited the store and ran toward Mr. Roberts' truck. Mr. Roberts said that he had worked in law enforcement for approximately forty years and had a permit to carry a handgun. Mr. Roberts told Defendant, "Stop or I'll shoot." Mr. Roberts did not see a weapon on Defendant, so he did not draw his gun. Defendant ran over to a Lincoln Continental, jumped in, and threw the pillowcase into the front passenger seat. Mr. Roberts said that he ran over to Defendant's vehicle and got into the passenger seat. Mr. Roberts grabbed the pillowcase as Defendant was starting the vehicle. Mr. Roberts jumped out of the vehicle, and Defendant drove out of the parking lot without the pillowcase. Mr. Roberts said that Defendant was dressed in a long flannel shirt or jacket despite the heat. Mr. Roberts identified Defendant as the perpetrator of the offense.

Officer Kevin Maycann, with the Knoxville Police Department, was dispatched to the drug store in response to the 911 call. Officer Maycann said that he obtained a description of the vehicle from the witnesses. He forwarded the information to the department's dispatcher, and a call was placed over the radio for the police to be on the lookout for a vehicle matching this description.

Officer Maycann also ran the license tag number of the Lincoln Continental through NCIC and determined that the vehicle was registered to Defendant. A few hours later, a police officer spotted the vehicle parked behind a house on Tower Drive. Several police officers, including Officer Maycann, parked around the perimeter of the house. Officer Mayconn said that a detective with the police department obtained the telephone number of the residence and spoke with someone in the house. Officer Maycann said that Defendant came out of the house and was transported to the police station.

Officer Tim Kesterson with the Knoxville Police Department processed the crime scene at the drug store. Officer Kesterson testified that he was able to recover a shoe impression, size eight and one-half, from the top of the pharmacy counter. He also took possession of a videotape from the surveillance camera in the pharmacy department. Officer Kesterson said that a black and white striped ball cap was recovered near the Lincoln Continental parked at Tower Drive. Defendant's shoes were examined during his interview with the investigating officers, and it was determined that he wore size eight and one-half.

II. Sentencing Hearing

At Defendant's sentencing hearing, the State relied on the presentence report and victim impact statement. Neither document, however, is included in the record on appeal. It also appears from the record that two letters written on Defendant's behalf were submitted for the trial court's consideration, but these letters are also not included in the record.

Based on Defendant's prior convictions, the trial court determined that Defendant was a Range II, multiple offender. Defendant did not object to the accuracy of the presentence report or his sentencing classification at the sentencing hearing. Defendant then testified in his own behalf. Defendant said that he had written a letter to Mr. DeBuhr apologizing for the offense. Defendant stated that he started using drugs when he was ten years old and had continued doing so for the next thirty-three years. Defendant said, however, that he had been sober for three years and five months while incarcerated on the current charges and had attended AA meetings after he was released on bond. Defendant said that this was the first chance he had to have a good life, and he would continue on this path no matter what sentence he received.

The trial court considered Defendant's prior convictions, other than those qualifying Defendant for sentencing as a multiple offender, and his criminal behavior as an enhancement factor in determining the length of Defendant's sentence. The trial court observed that Defendant had "a criminal record that's about five pages long," which apparently included convictions for burglary, drug possession, and driving while intoxicated. The trial court found that Defendant had sufficient prior convictions to justify sentencing him to the maximum sentence in the sentencing range. However, the trial court considered as a mitigating factor Defendant's efforts to straighten out his life. The trial court accordingly sentenced Defendant to eighteen years confinement. In the absence of a presentence report or proof to the contrary, we must presume the accuracy of the trial court's

findings of fact as they relate to the prior criminal history and other relevant background information of Defendant.

Defendant argues on appeal that the trial court failed to consider several mitigating factors such as his remorse and the absence of any injury or actual danger to the victims or others in the vicinity. Defendant points out that he did not attempt to harm anyone even when confronted by a customer outside the store, and he limited his choice of stolen prescription drugs to morphine rather than the more expensive Schedule II narcotics contained in the pharmacy's inventory. Accordingly, Defendant requests this Court to reduce his sentence to one "more consistent with the principles of sentencing for the range and crime for which he was convicted."

We note that Defendant's sentencing hearing was conducted on November 18, 2005, for an offense that was committed on June 29, 2002. Our legislature recently amended several provisions of the Criminal Sentencing Reform Act of 1989, which became effective June 7, 2005. The Act provides that defendants who are sentenced after June 7, 2005, for offenses committed before that date may elect to be sentenced under the provisions of the Act by executing a waiver of the defendant's ex post facto protections. 2005 Tenn. Pub. Acts ch. 353, § 18. The record does not reflect that Defendant executed such a waiver. Therefore, this case is not affected by the 2005 amendments, and the statutes cited in this opinion are those that were in effect at the time the instant crimes were committed.

When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a *de novo* review with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). If the record fails to show such consideration, the review of the sentence is purely de novo. *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In making its sentencing determinations the trial court must consider: (1) the evidence presented at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by Defendant in his own behalf. T.C.A. §§ 40-35-103 and-210; *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995). The defendant bears the burden of showing that his sentence is improper. T.C.A. § 40-35-401(d), Sentencing Commission Comments; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

Defendant was convicted of aggravated robbery, a Class B felony. As a Range II, multiple offender, Defendant was thus subject to a sentence of between twelve and twenty years. T.C.A. §40-35-112(b)(2). In calculating the sentence for a Class B felony conviction, the presumptive sentence is the minimum of the range, or twelve years, if there are no enhancement or mitigating factors. *Id.* § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the

sentence above the minimum of the range, but still within the range. *Id*. § 40-35-210(d). If both enhancing and mitigating factors are present, the trial court must start at the minimum of the range, enhance the sentence within the range as appropriate for the enhancing factors, and then reduce the sentence as appropriate for the mitigating factors. *Id*. § 40-35-210(e).

The trial court enhanced Defendant's sentence based on his "previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range." *Id*. § 40-35-114(2). The only mitigating factor suggested by Defendant which, in our view, could have been applicable was mitigating factor (1), Defendant's criminal conduct neither caused nor threatened serious bodily injury. *Id*. § 40-35-113(1). Although the trial court did not specifically articulate its analysis concerning application of this mitigating factor, it is apparent from the record that the trial court assigned little weight to the fact that Defendant's conduct did not cause any physical injury. The trial court observed that there were a lot of people "who were scared and hurt inside" as a result of Defendant's conduct. The trial court, however, found that Defendant's efforts to overcome his drug addiction, which also indirectly included consideration of his remorse, did serve to mitigate his sentence. *See id*. 40-35-113(13) (authorizing the trial court to consider "[a]ny other factor consistent with the purposes of this chapter).

Accordingly, even if only Defendant's prior convictions are considered (without taking into account other "criminal behavior" in order to avoid a Sixth Amendment right to jury issue, *see Cunningham v. California*, 549 U.S.____, 127 S. Ct. 856 (2007)) enhancement of the sentence by six years is justified. Defendant is not entitled to relief on this issue.

CONCLUSION

After review, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE